

No. 82-2151

Office-Supreme Court, U.S.
FILED

AUG 15 1982

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

FRESH POND SHOPPING CENTER, INC.,
APPELLANT,

v.

RENT CONTROL BOARD OF CAMBRIDGE,
APPELLEE.

On Appeal from the
Supreme Judicial Court
of Massachusetts

MOTION TO DISMISS

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I

Question Presented

Was it within the constitutional power of the Rent Control Board of Cambridge to deny Fresh Pond Shopping Center, Inc. a permit to demolish a rent controlled apartment building on property owned by it in order to change the use of the property from housing to department store parking?

II

Parties

The Supreme Judicial Court of Massachusetts in its judgment identified Appellee as Rent Control Board of Cambridge. Previously, the action had been formally prosecuted against Acheson Callahan, Jerald Billows, Fred Cohn, Judith Fellows and Tighe McSweeney in their capacities as members of that Board. The Board's current members are Acheson Callahan, Fred Cohn, Celia Josephson and Sally Ackerman.

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MOTION TO DISMISS

Appellee Rent Control Board of Cambridge hereby moves, pursuant to Supreme Court Rule 16, that the appeal filed herein by Appellant Fresh Pond Shopping Center, Inc., from the judgment of the Supreme Judicial Court of Massachusetts, be dismissed for want of a substantial federal question.

Statement of the Case

On October 22, 1979 Appellant Fresh Pond Shopping Center, Inc. ("Fresh Pond") applied to Appellee Rent Control Board of Cambridge ("the Board") for a "removal permit." Fresh Pond owned a six-unit rent controlled apartment building located at 49 Roseland Street, Cambridge. Under Ordinance 926 of the City of Cambridge, a removal permit was required before Fresh Pond could remove the building from rental housing use, demolish it, and use the site as a parking lot for a nearby department store.

On March 26, 1980, after a hearing, the Board denied the permit. It found that demolition of the building and use of the site for parking would "aggravate the shortage of decent rental housing accommodations" in Cambridge, in response to which shortage Ordinance 926 had been enacted, and found no countervailing factors to support issuance of the permit.

Ordinance 926 was enacted in 1979 by the City Council of Cambridge to control conversion of the city's rent controlled housing to other uses. It was adopted, and remains in effect, as an emergency measure, based upon the specific City Council findings that

A serious public emergency continues to exist in . . . Cambridge with respect to the housing of a substantial number of its citizens. . . . The emergency has worsened since 1976 because of the removal of a substantial number of rental housing units from the market. . . . [O]ver 10 percent of the controlled rental units . . . have been removed from the housing market since 1970, and the vacancy rate has fallen below one percent.

Ordinance 926, Section (1)(a) (Declaration of emergency).

Ordinance 926 therefore sought to conserve the remaining rent controlled housing stock in Cambridge by requiring that permits be obtained from the Board before such property was removed from rental housing use and converted to any other use.

On April 25, 1980, Fresh Pond appealed the Board's administrative decision to the Cambridge District Court, alleging that the permit denial was "arbitrary, invalid, and unconstitutional." Fresh Pond prevailed in that court, but on appeal the Massachusetts Superior Court granted summary judgment in favor of the Board. The Superior Court rejected Fresh Pond's state law arguments: that Ordinance 926 was inconsistent with Chapter 36 of the Massachusetts Acts of 1976, the Rent Control Enabling Act under which Cambridge maintained a rent and eviction control system; and that Ordinance 926 delegated excessive discretion to the Board. The Court further found that the Board's decision was supported by substantial evidence in the administrative record, and finally it held that the ordinance as applied to Fresh Pond by the Board was constitutional. On appeal, an equally-divided Supreme Judicial Court of Massachusetts affirmed the Superior Court decision in favor of the Board in all respects on March 3, 1983 without issuing an opinion. After that Court denied rehearing on March 30, 1983, this appeal followed.

ARGUMENT

I. ORDINANCE 926 IS A CONSTITUTIONAL RESTRICTION ON FRESH POND'S USE OF ITS REAL PROPERTY.

As applied to Fresh Pond, Ordinance 926 is nothing more than a local regulation of the uses to which a property owner may put his property.¹

A long line of cases in this Court upholds the power of local government thus to regulate land use. From early cases such as *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), through *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), to cases such as *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court has made clear beyond any possible argument that, so long as the regulation "substantially advance[s] legitimate state interests," without denying the landowner "economically viable use of his land," *Agins v. City of Tiburon*, *supra* at 260, it will not be found to be an unconstitutional taking for which compensation is required. Indeed, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982), while finding a New York statute unconstitutional because it authorized a "permanent physical occupation" of property, this Court was careful to note that

¹ The only action Fresh Pond challenges is the denial by the Board of its application for a permit to allow it to remove its property from the rental housing stock, demolish it, and use the site for a commercial parking lot. Fresh Pond does not and cannot base this litigation on any hypothetical refusals to grant permits for other purposes, such as renovation, construction of a larger apartment building, or conversion to condominiums. See, e.g., *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

Those aspects of Ordinance 926 which regulate condominium conversion were upheld against constitutional challenge in *Flynn v. City of Cambridge*, 1981 Mass. Adv. Sh. 692, 418 N.E.2d 335 (1981).

We do not...question the...authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

102 S.Ct. at 3179. (Emphasis in original.) The scope of permitted use regulation is emphasized by *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), cited with approval by the *Loretto* Court, 102 S.Ct. at 3174, in which this Court upheld against a "taking" challenge an order that a mine entirely cease operations.

On the record in this case, there is no substantial question concerning the constitutionality of Ordinance 926. The ordinance was enacted in response to an emergency created by the shortage of rental housing in Cambridge, and seeks to preserve such housing, during the pendency of that emergency, by requiring that a landlord obtain a permit from the Board before removing his property from use as rental housing and putting it to any other use. It cannot seriously be argued that preservation of housing stock in a time of shortage is not a legitimate state interest, and indeed Fresh Pond does not so argue. Nor has Fresh Pond argued that the refusal to allow the change of use of its property to parking has deprived it of any economically viable use of the property; it implicitly concedes as it must that the property viably may be used for housing.² Finally, Fresh Pond has not argued, and could not argue, that there is a violation of the Equal Protection Clause because Ordinance 926 applies only to property now used for rent controlled housing, and not to other property in Cambridge. In view of the shortage of rental housing, Cambridge reasonably could conclude that such property required special regulation.

It is of no federal constitutional significance that the use

² The Board is required by Massachusetts law to permit landlords to charge rents for rent controlled housing sufficient to assure a "fair net operating income." Chapter 36, Section 7(a). Should such a nonconfiscatory return not be possible for the property as rental housing, the Board would be required to grant a removal permit to allow a change of use of the property.

regulation is administered by the Board in conjunction with a rent control system, rather than as zoning. See *Hadacheck v. Sebastian*, *supra* (ordinance prohibiting brickmaking); *Goldblatt v. Town of Hempstead*, *supra* (ordinance regulating dredging). Under Massachusetts law, land use may be regulated outside the zoning system, see *Lovequist v. Conservation Commission of Dennis*, 379 Mass. 7, 12, 393 N.E.2d 858, 862 (1979), and the Supreme Judicial Court of Massachusetts already explicitly has characterized Ordinance 926 as imposing "use restrictions" on property. *Flynn v. City of Cambridge*, 1981 Mass. Adv. Sh. 692, 700, 418 N.E.2d 335, 340 (1981). The restriction imposed by Ordinance 926 therefore raises no greater constitutional issue than would a zoning change in Cambridge which limited Fresh Pond's property to housing use, and forbade its use for purposes such as commercial parking. Indeed, in the *Flynn* case the Supreme Judicial Court upheld Ordinance 926 against a "taking" challenge, finding that the restrictions imposed served "a legitimate public purpose" and that property owners were guaranteed "a fair net operating income" on property used as housing. *Id.* at 701, 418 N.E.2d at 340.

Accordingly, the constitutionality of Ordinance 926 as applied to Fresh Pond follows directly from established, controlling precedents of this Court, and this appeal should be dismissed for want of a substantial federal question.

II. ORDINANCE 926 DOES NOT AUTHORIZE ANY UNCONSTITUTIONAL "PERMANENT PHYSICAL OCCUPATION" OF FRESH POND'S PROPERTY.

Perhaps recognizing the fundamental weakness of its position, Fresh Pond in its Jurisdictional Statement struggles to recast the case into the mold of *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982). In *Loretto*, this Court restated the well-established rule that a "permanent physical occupation of an owner's property authorized by government

constitutes a 'taking.' " 102 S.Ct. at 3168. Applying the rule, it found a statute authorizing cable television companies permanently to install their equipment on the property of others to be unconstitutional.

Fresh Pond argues that, as a byproduct of the Board's denial to it of a removal permit under Ordinance 926, it is unable under other applicable Massachusetts law (Chapter 36 of the Massachusetts Acts of 1976, which establishes the Cambridge rent control system) to evict a tenant residing in an apartment in its building.³ It asserts that that results in a "permanent physical occupation" of its property by the tenant, similar to the permanent physical occupation of Loretto's property by Teleprompter's cable television equipment.

Fresh Pond's argument fails to raise a substantial federal question.

A. The Restrictions on Eviction of Fresh Pond's Tenant Are Imposed by Chapter 36, Which Fresh Pond Did Not Challenge Below.

Fresh Pond's attempt to force this case within the framework of *Loretto*—its argument that the restraint on its current ability to evict its tenant constitutes a "permanent physical occupation" of its property by that tenant authorized by government, and therefore a taking—does not present a challenge to Ordinance 926 at all.

Ordinance 926 deals only with removal of rental housing units (vacant or occupied) from the rental housing market; it does not restrict tenant evictions in any way. The only restric-

³ Fresh Pond secured the voluntary departure of the tenants in all but one of its building's units after the passage of Ordinance 926 but before commencing this litigation, apparently in anticipation of obtaining a removal permit. Those units remain vacant, but Ordinance 926 does not require that a property owner offer vacant units for rent against his will. Thus, contrary to the intimations in Fresh Pond's Jurisdictional Statement, those units are not "dedicated," even temporarily, to rental housing.

tions on eviction now in effect in Cambridge originated with Chapter 842 of the Massachusetts Acts of 1970, which authorized Cambridge to institute rent control. They now are embedded in Chapter 36 of the Massachusetts Acts of 1976, which extended that authority. Absent those eviction restrictions, Fresh Pond would be completely free to evict its tenant at any time despite the Board's refusal to grant a removal permit under Ordinance 926.

Thus, if any constitutional issue is raised by the fact that Massachusetts law places restrictions on the ability of Fresh Pond freely to evict its current tenant, it is with respect to Chapter 36. But this litigation was commenced and prosecuted throughout as a challenge to the validity of Ordinance 926, not as a challenge to Chapter 36. *See, e.g.*, Superior Court "Memorandum and Order on Cross-Motions for Summary Judgment," reproduced at Jurisdictional Statement, pp. 11-12 ("Plaintiff argues that the ordinance, as applied to its case, is unconstitutional for several reasons"). Perhaps recognizing these facts, Fresh Pond attempts now to argue to this Court, in effect, that it is the combination of Ordinance 926 and the hitherto-unchallenged Chapter 36 that takes its property. But Fresh Pond cannot be allowed to shift the fundamental target of its litigation from one statute to another in an appeal to this Court. This Court will not and should not pass upon issues not properly raised below.

B. There is No "Permanent Physical Occupation" of Fresh Pond's Property.

Even if Fresh Pond's challenge to Chapter 36, as applied in connection with Ordinance 926, is properly before this Court, it is not substantial.

1. *Fresh Pond may seek a permit to rehabilitate or demolish its building and use the site for housing at any time.*

The limited nature and consequences of the Board's decision denying Fresh Pond a removal permit make it abundantly clear that neither that decision nor Chapter 36 grants Fresh Pond's tenant any right of "permanent physical occupation."

Fresh Pond sought a permit only for the purpose of demolishing the apartment building on its property and using the site for parking for a department store. The Board found that this would "aggravate the shortage of decent rental housing accommodations" in Cambridge, which Ordinance 926 is designed to combat, and would not provide countervailing benefits.

There is nothing in the record before the Board or in this litigation to suggest that Fresh Pond could not obtain a removal permit if what it sought to do was consistent with the purpose of Ordinance 926 and the Board's expressed preference that Fresh Pond's property not be used for a purpose other than housing. Thus, there is no basis in the record for concluding that Fresh Pond could not get a removal permit, and evict its tenant under Section 9(a)(10) of Chapter 36, if it sought to rehabilitate its property, or even to demolish the property to construct new housing.⁴ Fresh Pond was prohibited by the Board only from occupying the property to put it to a forbidden use, namely parking. Such a limited prohibition of occupancy for an illegal use cannot be characterized as a taking of the right to occupy, much less as a grant to the tenant then in possession of any right of "permanent physical occupation."⁵ Contrary to Fresh Pond's fundamental assumption, therefore, its tenant, unlike Teleprompter in the *Loretto* case, has no right whatever permanently to occupy its property.

⁴ Section 9(a)(10) of Chapter 36 permits a landlord to evict his tenant "for any other just cause."

⁵ In *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1955), this Court upheld an order that a mine entirely cease operations. Although the order could be viewed as a prohibition on occupancy of the mine property, the case was cited with approval by the *Loretto* Court as an example of a lawful use restriction.

2. *A landlord may evict his tenant and occupy his property himself as housing at any time.*

Section 1(b) of Ordinance 926⁶ explicitly provides that the ordinance does not even apply if an owner of rent controlled housing himself wishes to occupy a unit of the building. Such an owner needs no removal permit from the Board, and may freely evict his tenant as a matter of right under Section 9(a)(8) of Chapter 36.⁷ In short, neither Chapter 36 nor Ordinance 926 offers any protection whatever, much less a right of "permanent physical occupation," to a tenant when the owner of the property involved himself wishes to occupy that property for the permitted purpose of housing.

The contrast with the *Loretto* case therefore is stark. Teleprompter could not be displaced from its occupation of Loretto's property even if Loretto herself wished to install cable television equipment in the same location. It had the absolute right permanently to occupy the space, and Loretto was permanently barred from occupation. But Fresh Pond's tenant would not be permitted to remain if its landlord wished to occupy the affected property for the use the Board permits for it, namely housing. It is only Fresh Pond's desire to change the use of its property that even makes it necessary for it to seek a permit, and there is thus no absolute right of "permanent physical occupation" in its tenant.

3. *Ordinance 926 is a temporary enactment.*

Unlike the statute found to constitute a taking in the *Loretto* case, Ordinance 926 by its very terms is a temporary measure. As such, it can create no rights of "permanent physical occupation."

⁶ "[T]his term 'removal from the market' [for which a permit is required] does not include occupancy of a non-condominium unit by the owner of the building in which it is located or by any member of his/her immediate family."

⁷ Section 9(a)(8) of Chapter 36 permits a landlord to evict his tenant if he "seeks to recover possession in good faith for use and occupancy of himself, or [specified family members]."

Ordinance 926 was passed after an express finding that a serious public emergency existed, and will cease to apply whenever either of two conditions is met: (1) the vacancy rate in rent controlled housing exceeds four percent (4%) (Ordinance Section 1(e)(1)); or (2) the number of (controlled *and* noncontrolled) rental units in Cambridge, excluding public housing, exceeds the number as of January 1, 1970 (Ordinance Section 1(e)(2)).

Fresh Pond argues that despite this provision Ordinance 926 should be treated as a permanent enactment. But Fresh Pond has established no factual basis whatever in the record for its argument to this Court that the two conditions specified in the ordinance cannot occur; it asks this Court simply to rule as a matter of law from the face of the ordinance that the conditions cannot be met and the ordinance therefore is permanent.

Fresh Pond cannot carry its burden of proof to establish the unconstitutionality of Ordinance 926 in this extraordinary way. Given neither evidence nor findings of fact by the courts below to the contrary, this Court can only assume that the events which will render this temporary ordinance ineffective in fact can and will occur; it cannot infer in the absence of evidence and findings that an ordinance temporary on its face in fact is a permanent enactment.

Moreover, in making its argument that Ordinance 926 is permanent on its face, Fresh Pond grossly mischaracterizes the plain text of the ordinance. Fresh Pond asserts that for Ordinance 926 to go out of effect the number of rent controlled units (not the total number of rental units) must exceed the number which existed in 1970. It then argues that since new construction is not subject to rent control, the number of rent controlled units will not increase, and the condition cannot be met. But new construction can increase the number of non-controlled units, and as indicated above contrary to Fresh Pond's assertion it is the total number of units, not merely those subject to rent control, which determines whether the ordinance is in effect.⁸

⁸ Moreover, new construction also will affect the rent controlled housing vacancy rate. Fresh Pond has not, and cannot, establish by argument, absent

C. Fresh Pond Never Had the Absolute Right to Occupy Its Property For Any Purpose.

Fundamental to Fresh Pond's argument that the denial of its application for a removal permit constituted the unconstitutional authorization of a "permanent physical occupation" of its property by its tenant, is the assumption that Fresh Pond at some time before the permit denial had an absolute right to occupy the property, for whatever purpose it wished, which the Board by its action transferred to the tenant. In fact, Fresh Pond never had such a right.

When Fresh Pond obtained title to its property, Chapter 36 and Ordinance 926 both were in effect, the property had been subject to rent and eviction control since 1970, and there was a tenant in possession as a result of the voluntary letting of the property by Fresh Pond's predecessor-in-title. Hence, the package of rights Fresh Pond purchased did not include the right immediately to occupy the property; Fresh Pond purchased the property subject to the right of the current tenant to continue in possession upon payment of rent. Fresh Pond therefore cannot complain that the Board's action has taken from it any right to occupy property.

D. This Court's Decision In The Loretto Case Did Not Change The Established Principles Of Law Under Which Cambridge Is Regulating The Landlord-Tenant Relationship.

Even aside from the above considerations, there is a fundamental reason why Fresh Pond cannot argue plausibly that its attempted application to this action of *Loretto v. Telepromp-*

evidence, that construction of new rental housing and condominium units ameliorating the current shortage will not result in an increased vacancy rate in older rent controlled buildings. Indeed, to the extent that any inference could be drawn in the absence of evidence, it could only be that the vacancy rate will increase as new construction takes place.

ter *Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982), creates any substantial federal question.

When this Court decided the *Loretto* case in 1982, it was well aware that its holding might be used as the basis for challenges to long-established principles of landlord-tenant law. It therefore explicitly sought to prevent such challenges by cautioning that it was not changing that settled body of law in any way:

[W]e do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. See, *e.g.*, . . . *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control).

102 S.Ct. at 3178. Thus by its very terms the *Loretto* decision is no basis for any challenge to Cambridge's regulation of rental housing.

The reasons are clear. The origin of the constitutional problem in the *Loretto* case was that the statute therein authorized a third party with whom the property owner had no prior relationship to occupy his property without consent. This government-authorized nonconsensual intrusion, because it was permanent, amounted to a taking. But the rent control and eviction restrictions upheld by this Court in cases such as *Bowles v. Willingham*, 321 U.S. 503 (1944), *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922), and *Block v. Hirsh*,

256 U.S. 135 (1921), as well as those imposed by Cambridge, applied only to tenants with respect to whom the property owner first established a voluntary tenancy. Neither in those cases nor in Cambridge is any person authorized to enter or occupy property without prior consent. Unlike the situation in the *Loretto* case, any tenancies continued under rent control are with tenants freely chosen by the landowner, and the landowner may, within the boundaries of the law, establish the terms of the tenancy by contract, or decline entirely, as Fresh Pond indeed has done with its vacant units, to accept any tenants at all. Thus, no nonconsensual "permanent physical occupation" of property is authorized.

In making explicit that it was not interfering with the states' "broad power to regulate . . . the landlord-tenant relationship," 102 S.Ct at 3178, the *Loretto* Court was reflecting the fact that in Anglo-American law that relationship always has encompassed a complex set of mutual obligations and been subject to special rules. Thus, in *Block v. Hirsh*, *supra*, the first of the many cases in which this Court upheld restrictions on eviction in the context of rent control, Justice Holmes wrote:

The preference given to the tenant in possession is an almost necessary incident of the policy, and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail.

256 U.S. at 157-158. Since the *Block v. Hirsh* decision, this Court repeatedly has upheld such eviction restrictions against constitutional challenge, and those cases are cited with approval in the *Loretto* decision together with *Block v. Hirsh*; there thus is no basis for Fresh Pond's argument that the *Loretto* decision supports its claim that its property has been taken by Cambridge's regulation of the landlord-tenant relationship.⁹

⁹ The only other case upon which Fresh Pond relies, *Rivera v. R. Cobian Chinae & Co.*, 181 F.2d 974 (1st Cir. 1950) (2-1 decision), is equally unhelpful to it. To the extent that it is not simply a thirty-year-old mis-

E. *Even Were There a "Permanent Physical Occupation" of Fresh Pond's Property, It Would Be Constitutional Because the Rent Control Statute Guarantees Just Compensation to Fresh Pond in Any Event.*

The emptiness of Fresh Pond's argument that its property has been taken unconstitutionally is demonstrated by the fact that the very statute which it challenges provides the compensation to which it would be entitled were there a taking of its property. In *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), this Court upheld a statute extending the period for redemption of real property sold after mortgage foreclosure; during the extended period the purchaser was prohibited from ousting the former owner and obtaining possession. This Court found the restriction constitutional, noting *inter alia* that

reading by a divided Court of Appeals of the long line of cases in this Court upholding rent and eviction controls, the *Rivera* decision is inapplicable to this case.

In *Rivera*, the Court of Appeals found that a prohibition of eviction, where the owner wished to occupy the rental property himself to use it as the tenant had been using it, was unconstitutional. But Ordinance 926 would not require Fresh Pond to obtain a removal permit if it wished simply to evict its tenant and occupy its property without changing the use of the property. Thus, Ordinance 926 would not even apply to the situation before the *Rivera* court.

Moreover, the *Rivera* holding was based expressly on a finding that the eviction restriction in the Puerto Rican statute had no reasonable relation to the statute's purpose; it was not the purpose of the Puerto Rican act, as it is of Ordinance 926, to prevent any worsening of the shortage of housing or to protect tenants in their occupancy. The court in *Rivera* expressly did not hold unconstitutional an eviction restriction in a situation, such as the one herein, where those were the purposes of the statute.

Thus, the paragraph from the *Rivera* decision quoted at length by Fresh Pond in its Jurisdictional Statement, to the effect that compelling the plaintiff to keep his property in the rental market and preventing him from using it himself "would appear to be a 'taking' of the property for which just compensation has not been provided," 181 F.2d at 978, is dictum, in addition to being inapplicable to the facts of this case and incorrect in view of this Court's consistent upholding of eviction controls in the rent control context.

While the mortgagor remains in possession, he must pay the rental value as that value has been determined, upon notice and hearing, by the court. . . . While the mortgage-purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period.

Id. at 425.

Here too, to the extent that Chapter 36 (not Ordinance 926) debars Fresh Pond from possession of any unit, Fresh Pond is entitled under that very statute to a nonconfiscatory "fair net operating income" as rental for the unit. Hence, unlike the property owner in *Loretto*, who was given a one-time \$1 payment, Fresh Pond is provided with exactly the payment to which it would be entitled if the Board indeed did "take" the unit for occupation by a tenant during the pendency of the housing emergency. Even if Chapter 36 constituted a taking, it therefore provides within it the very compensation to which Fresh Pond would be entitled, and hence is constitutional.¹⁰

Conclusion

The appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

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¹⁰ The Board would be required to permit Fresh Pond to remove its property from rental housing use if Fresh Pond were unable to obtain a constitutionally-adequate (i.e., nonconfiscatory) return on the property as rental housing. Fresh Pond has not alleged this to be the case. See note 2, *supra*.